

**FEDERAL PUBLIC DEFENDER  
CENTRAL DISTRICT OF CALIFORNIA  
321 EAST SECOND STREET  
LOS ANGELES, CALIFORNIA 90012  
213-894-2854; 213-894-7566 FAX**

MARIA E. STRATTON  
*Federal Public Defender*  
DEAN R. GITS  
*Chief Deputy*

CRAIG WILKE  
*Directing Attorney*  
*Santa Ana Office*  
OSWALD PARADA  
*Directing Attorney*  
*Riverside Office*  
**Direct Dial: 894-7528**

October 21, 2004

BY HAND DELIVERY

Chief Justice Ronald George  
and the Associate Justices of the  
California Supreme Court  
300 South Spring Street  
Los Angeles, CA 90017

Re: In re Anderson Hawthorne, Case No. S 116670

Dear Chief Justice:

The purpose of this letter is to apprise the Court that counsel for Respondent has taken positions contrary to those urged in the Return filed in this action on March 3, 2004. Contrary to their position in this case, the Attorney General repeatedly has acknowledged that individuals like Mr. Hawthorne, who have full scale IQ scores between 70 and 75, may be mentally retarded.

In *In Re Robert Young*, Case No. S115318, the Attorney General conceded “that if petitioner can establish the factual predicate of his claim, he is entitled to relief from his judgment of death.” (Informal Response filed December 31, 2003, at 23.) The Attorney General noted that Mr. Young, like Mr. Hawthorne, had obtained a full-scale I.Q. score of 75. (*Id.* at 29.)

However, contrary to his position in this case, the Attorney General conceded that Young’s 75 I.Q. score did not disqualify him from a finding of mental retardation, noting that “the documentation submitted indicates that petitioner is either mildly mentally retarded or that he falls within the range of borderline intellectual functioning.” (*Id.* at 31.) In reaching this conclusion, the Attorney General relied upon the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Forth Edition, Text Revision (“DSM IV TR”), noting that under the DSM, ““it is possible to diagnose Mental Retardation in individuals with

IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.” (Informal Response at 26, quoting DSM IV-TR at 42.)

The *Young* case is not an isolated example. The Attorney General has taken similar positions in many cases before this Court. See *In Re Horace Kelly*, Case No. S115483, Informal Response filed October 2, 2003, at 7 (“Because IQ tests typically have an error rate of plus or minus five points, individuals with IQ scores between 70 and 75 and significant deficits in adaptive behavior may be properly diagnosed as mentally retarded”); *In Re John Holt*, Case No. S116794, Informal Response filed on August 11, 2003, at 10 (“it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior”); *In Re: Antonio Espinoza*, Case No. S116824, Informal Response filed on September 19, 2003, at 15 (“it is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 and lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition”); *In Re Omar Martinez*, Case No. S112103, Informal Response filed December 13, 2002, at 145 (same); *In Re Donald Miller*, Case No. S115824, Informal Response filed June 10, 2003, at 13 (same); *In Re Clarence Ray*, Case No. S110219, Informal Response filed November 27, 2002, at 3 (same). See also *In Re Sergio Ochoa*, Case No. S121184, Informal Response filed April 7, 2004, at 92, n. 22 (“[e]rrors of measurement as well as true changes in performance should be considered in interpreting IQ test results. The concept of standard error of measurement (SEM) is an aid. One SEM is plus or minus a specified number of IQ points. Thus, an IQ of 70 could range from 66 to 74 assuming SEM of 4”); *In Re Jesse Morrison*, Case No. S115559, Informal Response filed on October 24, 2003, at 53, n. 16 (same); *In Re Stanley Davis*, Case No. S116750, Informal Response filed February 10, 2004, at 80, n.15 (same); *In Re Kevin Cooper*, Case. No. S116984, Informal Response filed on August 4, 2003, at 24, n.5 (same); *In Re Tracy Cain*, Case No. S116805, Informal Response filed on July 30, 2003, at 5, n. 2 (same).

Very truly yours,

Harry Simon  
Deputy Federal Public Defender

cc: Robert Henry, Deputy Attorney General  
Anderson Hawthorne